



Office of Investment Security

31 CFR Parts 800 and 802

Regulations Pertaining to Certain Investments in the United States by Foreign Persons and Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States

AGENCY: Office of Investment Security, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This proposed rule would modify the definitions of “excepted foreign state” and “excepted real estate foreign state” by extending by one year the effective date of one of two criteria set forth in the definitions in the regulations implementing certain provisions of Section 721 of the Defense Production Act of 1950, as amended.

DATES: Written comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF FILING FOR PUBLIC INSPECTION AT THE FEDERAL REGISTER].

ADDRESSES: Written comments on this proposed rule may be submitted through one of two methods:

- *Electronic Submission:* Comments may be submitted electronically through the Federal government eRulemaking portal at <https://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department of the Treasury (Treasury Department) to make the comments available to the public. Please note that comments submitted through <https://www.regulations.gov> will be public, and can be viewed by members of the public.
- *Mail:* Send to U.S. Department of the Treasury, Attention: Laura Black, Director of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

Please submit comments only and include your name and company name (if any), and cite “Proposed Regulations Pertaining to Certain Investments in the United States by Foreign Persons and Proposed Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States” in all correspondence. In general, the Treasury Department will post all comments to <https://www.regulations.gov/> without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Laura Black, Director of Investment Security Policy and International Relations, or Richard Rowe, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220; telephone: (202) 622-3425; email: CFIUS.FIRRMA@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Statute

On August 13, 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115–232, 132 Stat. 2173, was enacted. FIRRMA amends section 721 (as amended, section 721) of the Defense Production Act of 1950, as amended, which delineates the authorities and jurisdiction of the Committee on Foreign Investment in the United States (CFIUS or the Committee). Executive Order 13456, 73 FR 4677 (Jan. 23, 2008), directs the Secretary of the Treasury to issue regulations under section 721. This proposed rule is being issued pursuant to that authority.

FIRRMA maintains the Committee’s jurisdiction over any transaction which could result in foreign control of any U.S. business and broadens the authorities of the President and CFIUS under section 721 to review and take action to address national security concerns arising from

certain noncontrolling investments and real estate transactions involving foreign persons.

FIRRMA requires CFIUS to specify criteria to limit the application of FIRRMA's expanded jurisdiction over these noncontrolling investments and real estate transactions to certain categories of foreign persons.

*B. Definitions of Excepted Foreign State and Excepted Real Estate Foreign State –
Sections 800.218 and 802.214*

On January 17, 2020, the Treasury Department published a final rule at 85 FR 3112 (Part 800 Rule) that amended 31 CFR part 800 to implement CFIUS's jurisdiction over certain noncontrolling investments (which this rule describes as "covered investments"), as well as certain other provisions of FIRRMA. The Treasury Department also published a final rule at 85 FR 3158 (Part 802 Rule) that established new regulations at part 802 of title 31 of the Code of Federal Regulations relating to CFIUS's authorities and the process and procedures to review transactions involving the purchase or lease by, or concession to, a foreign person of certain real estate in the United States. The Part 800 Rule and the Part 802 Rule each took effect on February 13, 2020, and each address FIRRMA's requirement to limit the application of FIRRMA's expanded jurisdiction.

The "excepted foreign state" definition in the Part 800 Rule operates together with other relevant terms to exclude from CFIUS's jurisdiction covered investments by certain foreign persons who meet certain criteria establishing sufficiently close ties to certain foreign states. Section 800.218 defines excepted foreign state by a two-criteria conjunctive test, with delayed effectiveness for the second criterion. The first criterion is that the Committee identify a foreign state as an eligible foreign state. The second criterion is that, by the end of the two-year delayed effectiveness period (*i.e.*, by February 13, 2022), the Committee make a determination under § 800.1001(a) for each eligible foreign state as to whether such foreign state "has established and is effectively utilizing a robust process" to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security.

The “excepted real estate foreign state” definition in the Part 802 Rule operates together with other relevant terms to exclude from CFIUS’s jurisdiction certain real estate transactions by certain foreign persons who meet certain criteria establishing sufficiently close ties to certain foreign states. The Part 802 Rule applies a two-criteria conjunctive test in the definition of excepted real estate foreign state that is analogous to the test in the Part 800 Rule, except that the second criterion is a determination under § 802.1001(a) that the foreign state must have “made significant progress” in establishing and effectively utilizing the robust process and coordination that is described in § 800.1001.

On January 17, 2020, the Committee identified Australia, Canada, and the United Kingdom of Great Britain and Northern Ireland as eligible excepted foreign states under the Part 800 Rule and as eligible excepted real estate foreign states under the Part 802 Rule. Thus, as of February 13, 2020, when the Part 800 Rule and the Part 802 Rule became effective, each of the three identified eligible foreign states was deemed to be an excepted foreign state and excepted real estate foreign state, without regard in each case to the second criterion, which is a determination under §§ 800.1001 and 802.1001. In order to remain an excepted foreign state and excepted real estate foreign state after February 12, 2022, each foreign state must remain eligible under §§ 800.218(a) and 802.214(a), respectively, and the Committee must make the determinations required under §§ 800.1001(a) and 802.1001(a), respectively, regarding the foreign state.

II. Proposed Change

The proposed rule would change the date in each of §§ 800.218 and 802.214 from February 13, 2022, to February 13, 2023. The proposed rule therefore would have the effect of extending the delayed effectiveness period for the second criterion in each of the Part 800 and Part 802 Rules without making any change to the two-criteria conjunctive test in either the definition of excepted foreign state or the definition of excepted real estate foreign state. The proposed rule would make no change to any country’s status as an excepted foreign state or

excepted real estate foreign state. Under the proposed rule, the Committee may make a determination under § 800.1001 or § 802.1001 for an eligible foreign state, including Australia, Canada, the United Kingdom of Great Britain and Northern Ireland and any other state that the Committee identifies as eligible, at any time before the revised February 13, 2023, date.

As stated in the preambles to the Part 800 Rule and the Part 802 Rule, the two-year period of delayed effectiveness for the second criterion in the definitions of excepted foreign state and excepted real estate foreign state was intended, in part, to provide the initial eligible foreign states time to ensure that their national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment reviews meet the requirement under §§ 800.1001 and 802.1001. Extending the time period before which such requirements become applicable is desirable given certain ongoing changes to foreign investment review regimes.

III. Rulemaking Requirements

Executive Order 12866

These regulations are not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), because they relate to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, these regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to section 7(c) of the April 11, 2018, Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, RFA) generally requires an agency to prepare a regulatory flexibility analysis unless the agency certifies that the rule will not, once

implemented, have a significant economic impact on a substantial number of small entities. The proposed rule would extend the delayed effectiveness period for the second criterion in each of the Part 800 and Part 802 Rules without making any change to the two-criteria conjunctive test in either the definition of excepted foreign state or excepted real estate foreign state. The proposed rule therefore would not change the circumstances of any investor. Both before and after the proposed rule's effectiveness, any investor with sufficiently close ties to an eligible foreign state may be excepted from certain aspects of CFIUS's jurisdiction, including if engaging in a transaction with a small business. Such exception would be expected to lessen the burden on any such small business. The proposed rule therefore would not impose any additional burden on potential filers, including small businesses. Considering the foregoing, the Secretary of the Treasury certifies, pursuant to 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

31 CFR Part 800

Foreign investments in the United States, Investments.

31 CFR Part 802

Investments, Real estate transactions in the United States.

For the reasons set forth in the preamble, the Treasury Department proposes to amend 31 CFR parts 800 and 802 as follows:

PART 800—REGULATIONS PERTAINING TO CERTAIN INVESTMENTS IN THE UNITED STATES BY FOREIGN PERSONS

1. The authority citation for part 800 continues to read:

Authority: 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

Subpart B—Definitions

§ 800.218 [Amended]

2. Amend § 800.218 introductory text by removing the year “2022” wherever it appears and adding in its place “2023”.

**PART 802—REGULATIONS PERTAINING TO CERTAIN TRANSACTIONS BY
FOREIGN PERSONS INVOLVING REAL ESTATE IN THE UNITED STATES**

3. The authority citation for part 802 continues to read:

Authority: 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

Subpart B—Definitions

§ 802.214 [Amended]

4. Amend § 802.214 introductory text by removing the year “2022” wherever it appears and adding in its place “2023”.

Larry McDonald,
Acting Assistant Secretary for International Markets.
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